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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO.

TURNBULL CONE BAKING COMPANY
OF TENNESSEE

Petitioner

VERSUS

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the acceptance of the General Counsel's proof that an employee's protected activity is a motivating factor in a Section 8(a)(3) layoff case under the L.M.R.A. necessarily rejects, *sub silentio,* the employer's rebuttal evidence under *Wright Line,* 251 N.L.R.B. 1083 (1980) and this Court's decision in *N.L.R.B. V. Transportation Management Corp.*, 462 U.S. 393 (1983).

2. Whether the order of the Administrative Law Judge, and the review thereof by the United States Court of Appeals, Sixth Circuit, are of such a nature to be violative of the Fifth Amendment, United States Constitution, provisions regarding due process of law.

PARTIES TO THE PROCEEDING

Turnbull Cone Baking Company of Tennessee
National Labor Relations Board
Local Lodge No. 56, International Association of Machinists and Aerospace Workers
Nella Broadwell
Mark Raborn

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Turnbull Cone Baking Company of Tennessee respectfully petitions for a Writ of Certiorari to review the December 11, 1985 decision of the United States Court of Appeals for the Sixth Circuit in the subject case.

OPINIONS BELOW

The December 11, 1985 opinion of the United States Court of Appeals for the Sixth Circuit in *Turnbull Cone Baking Company of Tennessee v. National Labor Relations Board,* No. 84-5930/6035 is reported at 778 F.2d 292 (1985). The opinion of the National Labor Relations Board that was enforced by the Court of Appeals is reported at 271 N.L.R.B. No. 203 (1984).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) to review a judgment of the Court of Appeals for the Sixth Circuit, dated December 11, 1985.

STATEMENT OF THE CASE

Turnbull Cone Baking Company is one of the few manufacturers of ice cream cones in the United States, having begun its operations in Chattanooga, Tennessee in 1910. From 1923 until 1982 the Company conducted its manufacturing operations in a four story building located on Carter Street.

On the top floor of that building there were nine cone baking machines. Seven of these were devoted to manufacturing odd-shaped cones known as "fountain pack" or "food service" cones. Two of the fourth floor machines were devoted to the baking of standard cup size cones known as "retail service" cones. On the second floor and the third floors there were six retail service cone baking machines per floor. On the first floor there were seven sugar roll baking machines.

The twenty-eight machines described above were all custom built. The machines used by Turnbull had been

built on site beginning in 1907 and had not been changed since that time. These old basic cone machines had a production limitation of five thousand cones per hour. By 1980, competition from other cone manufacturers using European-built machines was achieving a production of twenty-five to thirty thousand cones per hour. Partly because of this, and other operational inefficiencies, Turnbull Cone Baking Company showed a profit of only one quarter of one percent on sales of three million dollars in 1980.

Turnbull employed, at the peak of its seasonal business, approximately sixty nonsupervisory employees working as cone packers, floor ladies, cone machine operators, shipping employees and batter-mixers. Because the manufacture and sale of ice cream cones is a highly seasonal business, the employees of Turnbull would typically be recalled from layoff each year in the late winter or early spring, and then laid off for lack of work in the fall of each year. In addition, because the orders placed by customers fluctuate with little advance notice, a practice of adding a second shift and then laying off the second shift when demand would not justify the additional production also existed.

None of the employees of Turnbull have been represented for purposes of collective bargaining by a labor union. There was no organizational activity at the Turnbull plant until 1981, and the employer was not placed on notice of that activity until June of 1981.

In the summer of 1980 discussions began within Turnbull management on the subject of liquidation versus relocation of the cone manufacturing business. In July and August of 1980 proposals were made by Greg Overton, then the chief operating officer of Turnbull Cone

Baking Company of Tennessee, to the Turnbull Board of Directors wherein a new plant would be constructed and the old manufacturing operation moved from Carter Street to a modern facility. As shown by Respondent's Exhibit No. 11 Overton's proposals were grounded on labor savings that would result by moving from the four floor operation into a one floor manufacturing layout. Later that same year Overton presented an application for the issuance of industrial revenue bonds to the City of Chattanooga's Industrial Development Board. This financing was approved in November of 1980, and construction of a new plant began.

Overton quit in early 1981, going into business in competition with Turnbull and succeeding in taking with him some of the "...increased volume that [he was] projecting..." in the form of Turnbull customers. Plans for construction of the new plant proceeded nonetheless.

In January of 1981 Wayne W. Turnbull replaced Greg Overton as chief operating officer of the Company. That month a meeting of all employees was called by Wayne Turnbull for the purpose of discussing the impending move to the new plant and countering rumors on that subject. In his talk Turnbull used the analogy of a football spring training camp to describe his proposal for employee training in anticipation of the move to the new plant. He told the people that certain of the baking machines would be combined in the old building and that this would create an opportunity for the employees to learn new skills, necessary before an employee could be transferred to the new plant. Turnbull testified that he told the employees "...we hope that all people could be included in the move..." It was recognized (and that fact accepted by the ALJ) before the start of union organizational activity that not all of the employees on

the payroll in the spring of 1981 would be needed to operate the new plant.

The key to increasing productivity per unit of labor cost at the new plant was based upon the idea that a number of existing retail service cone baking machines could be efficiently combined, or "ganged", on one conveyor belt. Respondent Ex. No. 16 shows an early blueprint layout (January, 1981) in which the ideal of ganging six of the existing retail service machines on one conveyor belt in the new plant was schematically drawn. This work, according to the testimony of Julian Bell, a consulting engineer, was done in January and February of 1981. In a meeting on February 12, 1981, the projected staffing in the new plant, based upon the new production methods, was discussed with the Turnbull supervisors.[1]

Turnbull first succeeded in combining two machines on one conveyor belt on the second and on the third floors toward the end of March. All of the cone packing employees were asked, in order of their seniority, to train on the combined machines. The employees were expressly advised that the training was in preparation for the automation that would exist in the new plant and that Turnbull wanted to observe the ability and willingness to change on the part of individual employees. This understanding was acknowledged by witnesses called by the General Counsel at the hearing herein and accepted by the Administrative Law Judge (D-11, lines 15-21).[2] Turnbull afforded its

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1. Prior to Turnbull's arrival in January of 1981, there was only one first line supervisor in the plant: Tom Hood. In January and February of 1981, Wayne Turnbull promoted two floor ladies, Betty Dawson and Evelyn Broadwell, to supervisory status.

2. References to the N.L.R.B. decision herein are identified by the prefix "D".

employees at least three chances each to qualify on the combined machines. The experience of the employer in this training endeavor varied. As noted by the testimony of Juanita Prince: "... some of them didn't want to, or couldn't do it."[3]

As people refused or were unable to qualify on the combined machines they were reassigned throughout the spring months to work on single food service machines on the fourth floor.[4] This reassignment was necessarily short-term for as early as January, 1981 it was decided that cone baking machines of marginal utility would have to be sold, in order to raise much-needed capital for construction. Thus in January the seven specialized "fountain pack" or "food service" machines on the fourth floor of the building were put up for sale. By May of 1981 contracts for the sale of six of those seven machines had been signed. The seventh machine was disassembled and used for spare part inventories in March and April of 1981.

The prospect of laying off persons working on the fourth floor as inventory was increased, and the necessity for dismantling and shipping the machines became imperative, was one that management had long anticipated. This is proven by testimony by all company witnesses *and a contemporanous memorandum in ear-*

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3. Among the witnesses called by the General Counsel, two admitted *refusing* the opportunity to qualify on the combined machines: Ellen Finley and Wilma Varner. Both are ordered reinstated, with backpay, by the ALJ's Decision.

4. As stated in his testimony, Turnbull explained the move of the employees to the fourth floor as being "... basically people who were not willing to learn the new skills or not able to learn the new skills, or had rates of absenteeism, whereby they became unreliable because of their absenteeism; each time one individual was absent resulted in one machine being shut down. Those with these types of problems... they were moved whenever feasible... they were moved to the fourth floor."

ly March, 1981 which forecast shutting down the fourth floor in July of that year (R. Ex. No. 28).

In June disassembly on the fourth floor machines that had been sold began, as Turnbull began balancing the need for additional capital against the need to assure that sufficient inventory was on hand.

In addition, Turnbull decided to sell all six sugar roll machines on the first floor. Turnbull realized it could buy sugar roll cones for resale cheaper than it could manufacture these cones with the old machinery located on the first floor. Solicitation of buyers for those machines began in May of 1981.

During the same time that Turnbull was taking steps to sell all of its marginal machinery, i.e., machinery that could not be combined and form an automated production line, a second shift was added so that inventory could be increased in anticipation of the dislocation that would result from the move to the new facility in the fall of 1981.

In June, notice was first given to Turnbull that certain of its employees were engaged in union organizational activity. At some point that month, supervisor Betty Denton realized that Willie and Mae Caldwell (former employees) were handing out union literature and cards at the plant door.[5] In late June, four employees each told supervisor Yvonne Broadwell that a union was trying to organize the Company.

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5. Evidence submitted by the General Counsel shows that 41 of the 45 cards signed by Turnbull employees were all dated after the week of June 22nd (G.C. Ex. No. 15-1 through 15-45). One of the other principal union organizers testified that he could not "recall" the name of any person who was given a card at the plant before June 25, 1981 (R-101).

The first of the anticipated substantial layoffs occurred on July 10, 1981. Twenty-eight persons were laid off by reason of their poor evaluations, poor attendance or their placement in jobs due to their inability or refusal to qualify on the combined machines. Prior to this large layoff, there had been a layoff of seven or eight employees in early June for similar reasons. That earlier layoff was not placed at issue in this proceeding by the union.

On July 11, 1981, Wayne Turnbull addressed a meeting of all employees who were retained at the Turnbull plant. In this address he told the employees that they were basically engaged in starting "a new business" and demurred when asked about further layoffs.

Shortly thereafter Turnbull determined that inventories had reached a sufficient level to accommodate dislocation losses, and that it was no longer necessary to run a second shift. As a result, all nine persons assigned to the second shift were laid off effective July 22, 1981. This layoff was not determined on an individual employee basis, as was the one on July 10th, but rather was a reduction in force of all persons assigned to the second shift. Turnbull anticipated that some overtime might be needed in view of the loss of the second shift production, but that was calculated and determined to be far less expensive than retaining all of the nine employees on the shift (R. Ex. No. 23.).

Ten days earlier, on or about July 12, 1981, the union reportedly conducted an organizational meeting at its headquarters in Chattanooga. Tom Hood, a Turnbull supervisor, was in the vicinity of the union hall that afternoon and was stopped by Messrs. Willie Caldwell,

James Hawthorne and Clarence Fitzgerald. Hood advised these gentlemen that he was in the area because he had brought his sister or one of his relatives to a flea market within three or four blocks of the union hall. Wayne Turnbull testified that he was not personally aware of the incident until three or four weeks after July 12th. He further stated that he had neither known of the meeting, nor of Hood's presence there until well after the decision to layoff the second shift had been made and effectuated.

Charges of discrimination under Section 8(a)(1) and (3) of the L.M.R.A. were filed on August 6, 1981, by 19 of the 28 persons laid off on July 10th. All nine of the employees laid off July 22nd filed similar charges. These matters were consolidated and tried as Case No. 10-CA-17282.

The Company's move to the new facility on Parmenas Road was completed around the first of 1982, following a period in which operations were occurring at both locations. The new layout has eight cone packers now running twelve cone baking machines, whereas at the Carter Street plant the manning for twelve cone baking machines was a minimum of fourteen persons. Respondent's Exhibit No. 24 shows the new layout at the new plant schematically, with six cone baking machines tied into one conveyor, another six tied into a second conveyor and two cone baking machines tied into a third.

In early 1982 the Company hired temporary labor to assist in clearing out old packing material and to help start up new lines. These were the first new employees since well before the July 1981 layoffs. These offers of temporary employment were sent to all female employees laid off on July 22, 1981. None of the men

laid off on July 22 were offered temporary jobs as there have been no jobs filled since that time requiring skills held by these employees. At the same time offers of temporary employment were also made to two persons who had been laid off on July 10, 1981: Joanne Cranmore and Linda Lee.

Among the employees hired on a temporary basis in early 1982 was Nella Broadwell, the alleged discriminatee in Case No. 10-CA-18157. Broadwell was hired February 26, 1982 as a production worker, and terminated for insubordination April 22, 1982. Broadwell had an unfortunate habit of neglecting her work in preference to extended chit-chat with other employees. She was warned on more than one occasion and finally given explicit instructions not to talk to employees J. Summers or M. Raborn while at work.

On April 22, 1982, Broadwell observed supervisor Denton assisting a rank-and-file employee, Nina Clark, in Clark's job, the two persons talking while inspecting cones. Broadwell approached Denton and launched into a loud tirade, complete with curse words directed at Denton, including calling Denton a "damn liar". Broadwell's anger was based upon her feeling of unequal treatment. Nina Clark, a rank-and-file employee, witnessed and heard the entire outburst.

One of the posted Company rules expressly lists "insubordination" as a reason for termination. Nella Broadwell was terminated later that day.[6]

During the period of transition to operations in the

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6. At a subsequent private meeting requested by N. Broadwell, she admitted to W. Turnbull that she had acted wrongly on the 22nd, and further that she had directed profanity at her supervisor (D-60).

new plant in 1981-82, various of the older, permanent employees were asked to perform in a variety of positions. One such employee was Mark Raborn. Raborn in this period worked as a mechanical helper, machine operator, batter mixer and inspector. Raborn volunteered to everyone in the plant that he was an active union organizer. At the same time he did not make any effort to hide his hostility to the Company and to supervisor Denton (D-61).

On or about May 6, 1982 Raborn was transferred to the third shift (i.e. 10 p.m. to 7 a.m.). Raborn balked at the instructions of floorlady M. Coots and persisted in a pattern of non-cooperation and loafing on the job. Raborn had been counseled several weeks earlier about his substandard performance. The failure of M. Raborn to perform culminated on the May 11-12 shift, at which time Wayne Turnbull paid a surprise visit to the plant, finding Raborn's machines inoperative, ice cream cones scattered everywhere and at least one employee threatening to quit unless something was done about Raborn. Turnbull terminated Raborn that morning for:

> "not doing assigned work properly. Continued efforts to change his work habits to no avail. Extremely poor attitude toward cooperation with fellow workers." (D-63)

Charges of Section 8(a)(3) discrimination were filed by both Broadwell and Raborn in May, 1982. Over objection by Turnbull these matters were consolidated with the earlier N.L.R.B. case, i.e., No. 10-CA-17282.

Following two separate series of hearings, Decision was issued by Administrative Law Judge Nancy M. Sherman on December 30, 1982, directing reinstate-

ment and backpay for twenty-three of the thirty Charging Parties.

THE COURT OF APPEALS IN FAILING TO APPLY A BURDEN OF PROOF ALLOCATION AS REQUIRED BY *WRIGHT LINE,* 251 N.L.R.B. 1083 (1980), IS IN CONFLICT WITH BOTH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND THIS COURT'S APPLICABLE DECISIONS.

This Court has established a clear procedure for the shifting of burdens in trial of § 8(a)(3)[7] unfair labor practice cases where valid business reasons are asserted by a respondent employer. This procedure requires that the General Counsel first discharge the burden of proving that the employee's conduct, protected by Section 7 of the Act, was a substantial or a motivating factor in the disputed discharge. The burden of persuasion then shifts to the employer, who can avoid being found in violation of § 8(a)(1) and §8(a)(3) by proving that the employee would have lost his job *notwithstanding his § 7 protected activity.* This standard was set forth by *Wright Line,* 251 N.L.R.B. 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and endorsed by the United States Supreme Court in *N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393 (1983). In *Transportation Management Corp.,* the Court at p.400 described the employer's burden under *Wright Line* as being:

> . . . proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried

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7. References to the Labor Management Relations Act, as amended, will be to the original sections of the Act and not to the U.S. Code designation. To illustrate, Section 8(a)(3) is found in 29 U.S.C. § 158(a)(3).

> the burden of proof by a preponderance of the evidence. "The shifting burden merely requires the employer to make out what is actually an affirmative defense . . ." *Wright Line, supra,* at 1088, n.11; see also id., at 1084, n.5.

The *Wright Line* procedure applies only in cases of "dual motives", and as pointed out by the Supreme Court in distinguishing *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), the "dual motive" or *Wright Line* case is one in which there are two or more motives behind the decision to terminate, and is not the case in which ". . . the issue is whether either illegal or legal motives . . . were the true motives behind the decision." *Transportation Management Corp., supra,* at 400, fn5. Thus if the Board rejects the employer's asserted business motive as pretextual then *Wright Line* has no application;[8] but where the Board agrees with the employer's affirmative defense or business reason then under *Wright Line* there can be no violation of §8(a)(3). If the Board finds a violation in such a case then it has committed legal error.

In the present case the Administrative Law Judge directed the reinstatement, with backpay, (1) of twelve employees who were among nineteen laid off on July 10, 1981 and (2) of all nine employees who were laid off on July 22, 1981 (D-86), because of her conclusion that ". . . all the alleged discriminatees separated in July 1981 were included in these separations because of their union activity or suspected union activity."

The General Counsel sought to prove his case through

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8. For a case where the Board denied application of Wright Line because the employer's rationale was concluded to be "pure pretext," see *Republic Die and Tool Co. v. N.L.R.B.*, 680 F.2d 463 (6th Cir. 1982).

testimony describing a frenetic organizing campaign starting in April of 1981, which campaign became increasingly public as the move to Turnbull's new plant drew closer.

Turnbull responded by proving the layoffs of July 1981 would have occurred *regardless* of the Local Union No. 56 organizing campaign. The facts proving the valid business reasons prompting the layoffs *and* the identification of the personnel affected were undisputed in large part and *in fact were adopted by the Judge in finding that the union organizational activity did not cause the July layoffs.* The ALJ refused to agree with the central argument of the General Counsel, i.e., that the startup of union organizing activity prompted Turnbull to layoff the twenty-eight employees in July rather than taking his entire workforce to the new plant. The Judge's conclusions were phrased as follows:

> "...that the record fails preponderantly to show that Respondent had a fixed and constant intention, before the Union's advent, to transfer all the employees to the new plant."

and that

> "...the record fails preponderantly to show that it was the Union's advent which motivated Respondent's 1981 decision not be retain its entire work force." (D-86)

In yet another context the same affirmance of the validity of the employer's business decision was stated as follows:

> "I infer from these circumstances and the probabilities of the situation that at all material times

before the move took place, Respondent hoped and expected that the move would enable it to use fewer employees than previously . . ." (D-80)

The foregoing findings clearly establish this as a "dual motive" case, subject to *Wright Line.* Compare *N.L.R.B. v. International Erectors, Inc.,* 712 F.2d 1131, (7th Cir. 1983) where *Wright Line* was not applied because ". . .the decision to lay off employees was made in response to the union's drive . . ." 712 F.2d 1131, 1137. Here in contrast the ALJ confirms that *the layoffs would have occurred notwithstanding union activity* at the Carter Street plant. Compare, too, *Birch Run Welding & Fabricating, Inc. v. N.L.R.B.,* 761 F.2d 1175 (6th Cir. 1985) where retaliation in a "general manner" against the entire workforce was shown. Here in contrast to *Birch Run,* individual anti-union motivation behind selection for layoff must be shown for a prima facie case.

The overwhelming conclusion that one draws from the record (one that even the ALJ had to admit as noted *supra*) is that this employer, in good faith and without dreaming of union organizational activity among its employees, launched an ambitious course of action aimed at revitalizing its old and proven business. At the end of this course would be a new plant, with new labor-saving techniques of manufacture — with fewer employees. The ALJ noted that Turnbull in October of 1980 was projecting a reduction-in-force at the new plant of forty employees (D-4, lines 13-15). All of this was proven beyond doubt to have occurred well before Local No. 56 first contacted the first Turnbull employee.

Coincident with the planning for the new plant, and partly prompted by a need for additional capital, in January and February of 1981 Turnbull began efforts to dispose of unneeded baking machines both on the

fourth floor ("fountain service" machines) and on the first floor ("sugar roll" machines. The record is undisputed that Turnbull had even *committed to those sales* before the union claims to have started its organizational activity at Turnbull. Because of these early decisions *it was recognized by management as early as the first week of March, 1981 that shutdown of the fourth floor would be necessary ". . . no later than the first week in July. . . " (R. Ex. No. 28).*[9]

Because the new plant would manufacture cones by "ganging" more than one baking machine, Turnbull sought in the first half of 1981 to train its employees on the new manufacturing techniques using several pilot lines ("double machines") at the old plant. Upon the evidence before her the ALJ described this management effort as follows:

> Turnbull decided to "team" or "gang" certain machines on the second and third floor, so that two of them would deposit cones on a single conveyor belt and to assign a single employee to pack the cones from both machines. Turnbull reached this decision partly "to get the people ready with the concept of change, of seeing a lot of cones coming at them at one time," partly to find out "who was really interested and willing to try new things and to learn new skills," partly to develop new employee skills, and partly to learn what problems would be incurred at the new plant, where the product of six machines was to be deposited on a single conveyor belt. About the end of March, Respondent ordered

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9. The importance of this exhibit under the *Wright Line* rationale is clear. If the employer intended a layoff because of a business prompted shutdown of a designated floor then affected employees cannot complain of discriminatory discharges under the Act.

the conveyors and belts need for this rearrangement. (D-11)

As the tryouts on "double machines" progressed, employees were transferred to the fourth floor (which was being phased out as described *supra*). the Chief Operating Officer of Turnbull testified:

> "...basically, people that were not willing to learn the new skills or not able to learn the new skills, or had high rates of absenteeism, whereby they became unreliable because of their absenteeism each time one individual was absent resulted in one machine being shut down. People that these types of problems...they were moved, whenever feasible, when we needed the fourth floor. Sometimes for a period of time, sometimes for a week at a time." (R-625).

The ALJ quotes this testimony, with apparent credit, and notes that Turnbull in further explanation testified that all of the employees later laid off on July 10th,

> "...couldn't all physically work on the fourth floor, because there was only a couple of machines running up there at the time. Both shifts. But these were people that had been primarily designated fourth floor type employees, because they had tried these other job skills and didn't grade out well on them." (D-22)

In sum, a layoff of a considerable number of employees had been forecast in early 1981. *There is no question* but that the motivation for such a cutback was valid and business related. Focus on the employees informally classed as "fourth floor" employees had occurred as ear-

ly as March (Resp. Ex. No. 28). The union activity at the old plant did not begin — according to the ALJ — earlier than April of 1981 (D-12). By far the greatest amount of union activity occurred after the week of June 22nd as forty-one of the forty-five union cards put into evidence by the General Counsel are dated thereafter (G.C. Ex. 15-1 through 15-45). The assignment of employees (following training) to the "fourth floor" had already occurred.

The ALJ does not discredit the proof adduced by Turnbull to the effect that (1) a layoff was prompted by business considerations, and (2) the layoff would be of employees not willing or able to learn the new skills, or prone to excessive absenteeism, i.e. persons assigned to the "fourth floor". Despite the affirmative defense posed by Turnbull, the ALJ did not address the *Wright Line* allocation of burdens. She simply concluded that "...all of the alleged discriminatees separated in July, 1981 were included in these separations because of their union activity or suspected union activity."

This assignment of error was ignored, without comment by the N.L.R.B. in its affirmance of the ALJ.

The Sixth Circuit, however, did address Turnbull's argument and concluded that the Board had complied, albeit *sub silentio,* with the requirements of *Wright Line,* by finding that Turnbull had not proven its affirmative defense. The Court said:

> The ALJ *appears to have credited aspects of both contentions,* in that she acknowledged a legitimate motive for discharging some workers (the move to the new plant), but found that the workers actually terminated or laid-off had been selected for illegal reasons (their real or suspected union activity).

> Turnbull's argument for reversal on this point is that the ALJ failed to employ a formal *Wright Line* analysis, and therefore that her conclusions are legally erroneous. This argument focuses on the form of *Wright Line* and ignores its substance. *Wright Line* established an affirmative defense for employers charged with violations of the NLRA. After employees show a prima facie violation, the employer may escape liability by proving that the action against employees would have occurred, for legitimate business reasons, even in the absence of anti-union sentiment. *Transportation Management,* 462 U.S. at 401-02. In this case, the ALJ found not only that Turnbull had failed to meet this burden of proof; she affirmatively found that the discharges in question were motivated by anti-union animus. This finding, which we find was supported by substantial evidence, *necessarily rejected Turnbull's proffered business justification defense.* Accordingly, if there was error in failing to follow the burden-shifting procedures outlined in Wright Line, the error was harmless, since *the ALJ at least found that Turnbull had failed to prove its affirmative defense.* (Emphasis added)

The Sixth Circuit has, by its decision, condoned a perversion of the *Wright Line* and *Transportation Management* shifting burdens whereby the Board's initial proof is deemed dispositive, effectively depriving the employer of an opportunity to show that notwithstanding the alleged illegal motivation the personnel action would have occurred. Note that the ALJ here accepted as the root of her decision the proposition that twenty-one of the twenty-eight Charging Parties laid-off in July, 1981 were chosen for layoff because of anti-

union bias.[10] This satisfies the General Counsel's initial burden Section 10(c) of the Act. The employer for its part proved that layoffs were inevitable (predating union activity by a wide margin) and that such criteria as trainability, productivity, dependability, etc. were used in reassigning employees to positions (e.g. on the fourth floor) subject to the impending reduction-in-force. The ALJ did not find this proffer to be pretextual. As noted *supra* she agreed that layoffs were planned and unrelated to later union activity. The Sixth Circuit contends that she found instead that the employer failed to carry its burden by finding that the Charging Parties *were chosen for layoff because of anti-union bias. But that's what was accepted as a prima facie case,* on behalf of the General Counsel, not rebuttal of the employer's showing of an affirmative defense under *Wright Line* and *Transportation Management.* The Sixth Circuit by confusing "substance" and "form" has returned the Court to a pre-*Wright Line* posture, where an employer's affirmative defense is without legal meaning or value.

The error in analysis is especially dramatic when considering the second layoff, i.e., of the entire second shift on July 22nd. The ALJ concludes that Turnbull's decision to terminate all persons working on the extra shift, which shift had been hired to meet peak production requirements, was discriminatory because ". . . it would appear more natural that Respondent would select for separation the least desirable employees, regardless of shift. . ." (D-83, lines 16-18). Thus did the ALJ accept the General Counsel's burden. But Turnbull introduced uncontroverted evidence that (1) inventory had increased sufficiently that the extra shift was not needed, and (2) that it was uniformly the employer's practice

10. Without however any proof being adduced that the employer knew of or suspected union activity by eleven of the Charging Parties.

to lay off extra shifts, and not to reassign employees willy-nilly from day to night or vice versa. If, assuming arguendo, Turnbull had known of union activity by every one of the second shift employees, and had acted on that knowledge, consciously terminating each one because of their union activity, *there still would be no violation* if Turnbull, *as it in fact did,* proved the layoff would have occurred in any event. The Sixth Circuit confusing substance and form would stop at the first question and conclude that a positive answer "necessarily" rejects the employer's proof. Such a result conceptually makes a travesty of *Wright Line.*

Such a result is also directly contrary to the precedent found in every other circuit. Without belaboring the point, every other Court of Appeal in a "dual motive" case has allowed the respondent to adduce proof in avoidance and defense of the General Counsel's *prima facie* case. *N.L.R.B. v. Horizon Air Services,* 761 F.2d 22 (1st Cir. 1985); *Allbritton Comm. Co. v. N.L.R.B.,* 766 F.2d 812 (3rd Cir. 1985); *N.L.R.B. v. Nueva Engineering,* 761 F.2d 961 (4th Cir. 1985); *N.L.R.B. v. Bliss & Laughlin Steel Co., Inc.,* 754 F.2d 229 (7th Cir. 1985); *N.L.R.B. v. Searle Auto Glass, Inc.,* 762 F.2d 769 (9th Cir. 1985); *N.L.R.B. v. So. Fla. Hotel,* 751 F.2d 1571 (11th Cir. 1985) and *Passaic Daily News v. N.L.R.B.,* 736 F.2d 1543 (D.C. Cir. 1984).

Such proof necessarily has to be found pretextual *(Bliss & Laughlin Steel, supra),* insufficient *(Horizon Air Service, supra),* or sufficient as an affirmative defense *(Neuva Engineering, supra).* But in *no case* has any Circuit Court of Appeals, as here, cited the General Counsel's *prima facie* showing as dispositive, in and of itself, in rejecting the respondent's showing. To do so makes a sham of *Wright Line* and this Court's decision in *Transportation Management.*

A writ must and should be issued to correct this departure from important federal precedent.

THE CONSOLIDATION OF CASES AND ISSUANCE OF A PROLIX ADMINISTRATIVE DECISION PREVENTED EFFECTIVE JUDICIAL REVIEW AND THEREBY VIOLATED THE RESPONDENT'S RIGHT TO JUDICIAL DUE PROCESS.

The Administrative Law Judge herein issued a ninety-three page order, with single-spaced type, in three separate N.L.R.B. cases against the Turnbull Cone Baking Company. Because of the nature of that decision, a carefully undertaken review was in order. This was not possible because of the verbosity and tortuous manner in which the decision was written. The Sixth Circuit of the United States Court of Appeal following oral argument issued a brief eight and one-half page opinion.[11]

The "clearly erroneous" standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure governs appellate review of facts. A reviewing court is bound by the findings of fact unless those findings are clearly erroneous. Reviewing courts have not hesitated to remand cases for more specific findings when the decisions lacked sufficient factual information to permit application of the "clearly erroneous" test. *Sylvester v. Callon Energy Servs.*, 724 F.2d 1210, (5th Cir. 1984). Administrative law cases where there were insufficient or no facts set forth as a basis for the decision have been

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11. At oral argument the three-judge panel began by expressing incredulity that appellant would expect them to review in detail the convoluted ninety-three page decision before them on a question of "substantial evidence."

called violative of due process.[12] *Northern California Power Agency v. Morton,* 396 F.Supp. 1187 (D.D.C. 1975). There are striking similarities between these cases and the Turnbull case.

The order of the Administrative Law Judge in the instant case is impossible to follow. Precise findings are hidden or missing altogether in the lengthy statement of superfluous facts. As a specific example, the ALJ denied claims by six of the Charging Parties because there was no evidence that the employer knew or suspected them of union activity (D-79, lines 25-33). But there was similarly no evidence as to eleven other employees the ALJ ordered reinstated. This error was argued to the Board and then to the Sixth Circuit, but presumably because of the practical impossibility of testing that claim by winnowing findings in a ninety three single-spaced opinion, neither reviewing body ruled on the error.

It is the contention of Turnbull Cone Baking Company that such a profusely detailed, copious and labyrinthine N.L.R.B. order, not properly reviewed, is much akin to an opinion without reasons for judgment. In the one instance, one cannot see the forest for the trees; in the other, there simply are no trees. The Administrative Law Judge was to show the path through the forest, but she has merely demonstrated that there are trees in the woods. Turnbull was denied due process of law in the same fashion as had the Judge given no basis for her ruling.

The Fifth Amendment applies to action taken by the

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12. *Accord, Garney v. Freeman,* 397 F.2d 600 (10th Cir. 1968), where the court stated that "...factual determinations are not final and conclusive unless relevantly supported by the record – an administrative order without factual support is without due process."

federal government and its agencies. *Public Utilities Commission v. Pollak,* 343 U.S. 451, (1952). Fifth Amendment procedural due process has been held to apply to N.L.R.B. cases. U.S. Const. amend. V; *Royal Typewriter Co. v. N.L.R.B.,* 533 F.2d 1030 (8th Cir. 1976). Administrative due process must be found in the administrative record. *Garvey v. Freeman,* 397 F.2d 600 (10th Cir. 1968). The threshold inquiry which must be made is whether the agency action has deprived a person of an interest in property or liberty. *Board of Regents v. Roth,* 408 U.S. 564, (1972). In the instant case, the Judge's decision, if enforced, will not only deprive the Turnbull Cone Baking Company of property. The deprivation will be so extreme as to force this small business into bankruptcy.

A determination that a due process liberty or property right has been violated does not determine the amount or type of process that is constitutionally required. Due process is a flexible concept and its procedural requirements vary depending upon the specific deprivation. *Morrissey v. Brewer,* 408 U.S. 471, (1972); *Orloff v. Cleland,* 708 F.2d 372 (9th Cir. 1983); *Old Dominion Dairy v. Secretary of Defense,* 631 F.2d 953 (D.C. Cir. 1980). Due process, to be effective, must be accorded at a meaningful time and in a meaningful manner. *Blackhawk Mining Co. v. Andrus,* 711 F.2d 753 (6th Cir. 1983); *Royal Typewriter Co. v. N.L.R.B.,* 533 F.2d 1030 (8th Cir. 1976). The determination of what procedures are required to satisfy due process depends on an analysis of the particular case in accordance with a three-part balancing test. *Matthews v. Eldridge,* 424 U.S. 319, (1976); *Orloff v. Cleland, supra; Old Dominican Dairy v. Secretary of State, supra.* The facts that must be considered are:

1. The private interest that will be affected by official action;

2. The risk of an erroneous deprivation of that interest through the procedure used; and

3. The fiscal and administrative burdens that any additional procedural requirements would entail.

Application of these principles to the Turnbull Cone Baking Company situation compels the conclusion that the decision issued by the Administrative Law Judge and the Sixth Circuit review of same, taken together, are violative of due process. First, the extensive and adverse effect of the government action would destroy the company if the Judge's decision is permitted to stand.[13] Turnbull's deprivation of property would be based on an improperly drawn decision, followed by a necessarily deficient review. Lastly, the minimal requirement that the Administrative Law Judge issue concise and to the point decisions, which could then be adequately reviewed, would add insignificant fiscal and administrative burdens on the agency or court. Certainly Turnbull's private interest is of sufficient magnitude to overcome the government's interest.[14]

The essence of due process is "fundamental fairness." *Galvan v. Press,* 347 U.S. 522, (1954); Evans v. Wilderson, 605 F.2d 369 (7th Cir. 1979). The Byzantine approach of the Administrative Law Judge in this case has led to a randomly confusing decision which is anything

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13. *Accord, Old Dominion Dairy v. Secretary of Defense,* 631 F.2d 953 (D.C. Cir. 1980), where the economic life of a government contractor was in jeopardy due to agency action.

14. *Compare, Blackhawk Mining Co., Inc. v. Andrus,* 711 F.2d 753 (6th Cir. 1983).

but fair to Turnbull. The range of the decision was far too wide to permit application of the proper review standard by the appellate court. The application of the standard in a meaningful manner was not attempted in any event by the Sixth Circuit. The appellate court was under a duty to review the fairness of the N.L.R.B. decision. The courts have held that there is no escape from a careful examination of the record to enable the reviewing court to meet its responsibility "for reasonableness and fairness of Labor Board decisions." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1952); *Home Town Foods, Inc. v. N.L.R.B.*, 416 F.2d 392 (5th Cir. 1969). The Sixth Circuit did not meet its duty in this case and its cursory review is a continuation of the failure to provide due process of law for Turnbull. The courts have held that the findings of the N.L.R.B. are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeal precludes the Board's order from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. *Universal Camera Corp. v. N.L.R.B., supra.* Here, the broadly haphazard decision by the ALJ is justified by nothing in the administrative record and should have been at least thoroughly reviewed by the appellate court. The necessity for adequate independent judicial review of administrative action has been amply set forth by this Honorable Court in *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 74 (1936), as follows:

> "When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, *provided the requirements of due process which are specially applicable to such an agency are met,* as in according a fair hearing and acting upon evidence and not arbitrarily.

[Citation omitted.] In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power . . . Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for

> reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. [Emphasis added.]

Judicial review has two primary functions — that of imprinting governmental action with the stamp of legitimacy, and that of checking the various branches of government when these encroach on ground forbidden to them by the Constitution as interpreted by the courts. These two functions are not independent of each other; on the contrary, they may be looked upon as different aspects of the same function. In the Turnbull case, the Sixth Circuit should not have legitimized the rambling N.L.R.B. order by its affirmation. The court failed in its duties to determine fairness to Turnbull and to curb the agency violation of due process.

CONCLUSION

A Writ of Certiorari must and should issue to the Court of Appeal for the Sixth Circuit in this case because (a) there has been grievous error in application of the proper burdens of proof, and (b) judicial review in the first instance has been denied the respondent employer by issuance of a non-reviewable administrative decision, all in violation of respondent's constitutional right to due process.

Respectfully submitted this the _____ day of March, 1986.

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